

**LIST OF COMMENTERS**

**Ad Hoc Coalition of Telecommunications Manufacturing Companies  
("Ad Hoc Coalition")**

**Ameritech Operating Companies ("Ameritech")**

**AT&T Corp. ("AT&T")**

**Bell Atlantic and NYNEX ("Bell Atlantic/NYNEX")**

**Bell Communications Research, Inc. ("Bellcore")**

**Bellsouth Corporation ("Bellsouth")**

**Competitive Telecommunications Association ("CompTel")**

**GTE Service Corporation ("GTE")**

**LCI International Telecom Corp. ("LCI")**

**Lucent Technologies, Inc. ("Lucent")**

**Northern Telecom, Inc. ("Nortel")**

**SBC Communications, Inc., Southwestern Bell Telephone Company,  
Pacific Bell and Nevada Bell ("SBC/PacTel")**

**Sprint Corporation ("Sprint")**

**Telecommunications Resellers Association ("TRA")**

**Public Utility Commission of Texas ("Texas PUC")**

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**ATTACHMENT B**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	CC Docket No. 96-98
Petition of MCI for	)	File No. CCB POL 97-4
Declaratory Ruling	)	
	)	
	)	

AFFIDAVIT

Qualifications

1. I am an attorney at law, practicing in the City of Los Angeles, California. I have been a member of the Bar of the State of California since January of 1965. At the time of my admission to the California Bar I was on active duty with the United States Army, serving as an air defense artillery officer. My military service continued until October of 1966 when I was honorably released from active duty with the rank of Captain. Prior to reporting for active duty in the Army, I had been employed by the law firm of Irell & Manella. Upon my discharge from active duty I returned to Irell & Manella where I have practiced continuously since October of 1966.

2. I am currently a partner in Irell & Manella LLP. My practice consists primarily in the representation of clients in the computer, telecommunications, multimedia and other advanced technology industries as well as clients purchasing or licensing technology-based products and services. Since approximately the Fall of 1967, I have been actively engaged in the structuring, drafting, negotiation and analysis of a broad range of agreements involving the licensing or transfer of technology and related intellectual property rights.

3. In 1974, I co-authored, with Gerald H. Larsen, a book entitled Data Processing Contracts and the Law, which was published by Little, Brown & Company. This book was primarily devoted to the legal and practical issues posed by various types of contracts for the procurement of data processing equipment, software and services, including the intellectual property issues posed by such agreements. In 1986, I co-authored, with Peter B. Frank and Norman Statland of Price Waterhouse, a two-volume treatise entitled Bernacchi on Computer Law, which was also published by Little, Brown & Company. Once again, the primary focus of the treatise is contracts for the purchase and licensing of technology, including intellectual property issues. This treatise is regularly updated and supplemented.

4. I have also taught courses at the University of Southern California Law Center on several occasions addressing

many of the topics covered in my treatise, including the licensing of intellectual property.

5. I am currently serving as Co-Chairman of Committee R (International Computer and Technology Law) of the International Bar Association's Section on Business Law. Committee R sponsors seminars and sessions at International Bar Association conferences dealing with a variety of issues relating to computer, telecommunications and other advanced technologies, including licensing of intellectual property. I have also served as a member of the Board of Directors and a past President of the United States Computer Law Association and currently serve on its Advisory Board. The Computer Law Association also addresses similar issues in its conferences and seminars. My full curriculum vitae is attached hereto.

#### **Response to Milgrim Affidavit**

6. I have reviewed the Affidavit of Roger M. Milgrim submitted on behalf of SBC/PacTel in these proceedings (the "Milgrim Affidavit"). I am personally acquainted with Mr. Milgrim and respect him as a lawyer and author. As a result, I was quite surprised at what appears to me to be a gross mischaracterization of the impact of intellectual property rights on the matters before the Commission in this proceeding.

7. I don't believe that anyone would dispute the fact that the types of equipment, software, firmware and other elements of the incumbent local exchange carriers' ("ILECs") networks (the "Local Networks") at issue in these proceedings may be, and probably are, the subject of a variety of intellectual property rights and that such rights are often the subject of licensing transactions. However, the extensive description of the types of rights involved and how they apply to various elements of the technology at issue begs the fundamental questions. Even assuming that numerous intellectual property rights are held by various vendors and that such rights are licensed to the ILECs, there is nothing inherent in such intellectual property rights that would prevent the ILECs from providing access to unbundled elements of the Local Networks to competitive carriers ("CCs"). The proper analysis of the issues in these proceedings should focus on the anticipated uses to be made by the CCs of the Local Networks, as mandated by the Telecommunications Act of 1996 (the "Act"), and the extent to which those uses are permitted under the licenses granted to the ILECs.

8. With respect to the first question, it is my understanding from information provided to me by AT&T that the access that is being sought by the CCs is merely access to the physical infrastructure (and associated functionalities) of the Local Networks. This will enable the CCs to provide telecommunications services to end users through the ILECs'

network components as contemplated by the Act. I have been informed that access to the source code of any software (and hence to any of the confidential or proprietary information or technology embodied therein) is not necessary to carry out the purposes of the Act. I am further informed that no "direct" access even to the object code of any software in the Local Networks is necessary. Although the object code will process the traffic transmitted by the CCs (arguably an indirect access), the CCs will not have direct access to the terminals or other equipment that operate the software. Hence, the CCs will not be in a position to obtain or control confidential information or to disclose or compromise the elements of the Local Networks which may be protected by intellectual property rights. Thus, except for the fact that the Local Networks will be carrying traffic for CC customers as well as for ILEC customers, the technical uses made of the licensed technologies and the entities that will have access to any confidential or proprietary information will be no different than those that were undoubtedly contemplated when the licenses were originally granted to the ILECs.

9. Turning to the second question, i.e., are the uses to be made by the CCs of the Local Networks permitted under the existing licenses granted to the ILECs?, it would seem that the answer lies, at least in part, in an analysis of what business activities are contemplated by the license grant in each instance. While I have not had the opportunity to review the specific licenses at issue, it is quite common in such license agreements for the actual license grant to focus on the licensee's "business" or "internal business" or words of similar import. Absent specific limitations in the license agreement prohibiting certain types of activities, the scope of the license grant is commensurate with the licensee's business. Since most businesses evolve and change to some extent over time, the reference to the licensee's business is usually intended to encompass such changes.

10. It is my understanding that the ILECs have historically been engaged in various forms of providing access to the Local Networks and that these activities have been viewed as part of the normal business activities of the ILECs. Since access by the CCs is being mandated by law and is technically very analogous to the access provided to others in the past, it seems unlikely that the mandated access by the CCs would be determined to be outside the scope of the ILECs' business for purposes of the license grants.

11. For the reasons indicated above, it appears that the ILECs' arguments for restricting CC access to network elements based on vendors' intellectual property rights grossly overstates the case for the ILECs with respect to the vendors' intellectual property rights. Nonetheless, without having had the opportunity to review the various licenses involved, it cannot be stated with certainty that the above analysis would

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prevail in all instances. Therefore, on the assumption that at least some instances can be cited in which specific provisions in the license agreement prohibit the type of access by the CCs that is mandated by the Act, the issue of which entities should be responsible for obtaining any necessary extensions to the license grant should be addressed.

12. Given the fact that the ILECs have selected the vendors involved in the Local Networks, are familiar with the terms of the license agreements and the intentions of the parties when those agreements were executed, and have continuing relationships with those vendors, the ILECs are the logical entities to seek any necessary modifications to the license grants. It is generally easier for a party to a continuing business relationship to negotiate changes in that relationship than for a third party to do so. Furthermore, to require the CCs, some of whom are relatively small companies with little or no bargaining strength to negotiate under circumstances in which the CCs have no other alternative but to reach agreements with all of the affected vendors if the CCs are to be able to take advantage of the Commission's mandate, increases dramatically the opportunity for the vendors to extract prices that would be highly anti-competitive, thereby defeating one of the principal objectives of the Act.

13. Another concern expressed in the Milgrim Affidavit is the fact that the holders of the intellectual property rights would have no control over the CCs or any ability to enforce their intellectual property rights if the ILECs obtained the necessary extensions, if any, to the license grants to permit the access mandated by the Act. This concern is also unfounded. License agreements often permit sublicensing or access to third parties under circumstances where the third party must agree to abide by certain agreements or provisions of the license agreement in order to be eligible for a sublicense or access to the licensed technology. Furthermore, since the uses contemplated by the CCs in these proceedings do not involve the kinds of "direct" access to the technology or confidential information that most holders of intellectual property rights are concerned with (because such access will continue to be enjoyed exclusively by the ILECs), the likelihood that any of the vendors would ever have a need to enforce its intellectual property rights against one of the CCs is greatly reduced or virtually eliminated.

14. Needless to say, if the ILECs can force the CCs to negotiate with vendors under circumstances in which the CCs have no choice but to make a deal with those vendors, the likely result is a significantly higher cost for obtaining the access that the Act mandates be provided at non-discriminatory cost-based rates. Requiring the CCs to negotiate with the vendors under these circumstances virtually guarantees a

"discriminatory" price because the vendors have no incentive to do anything other than to extract the highest price possible. On the other hand, if further negotiations are necessary and the ILECs conduct those negotiations, the vendors should be interested in preserving their relationships with the ILECs and not adding unreasonable costs to the infrastructure of the ILECs, which will be partly borne by the ILECs. The normal constraints in this type of negotiation will almost certainly produce a lower overall cost for the necessary rights.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on May 5, 1997

  
Richard L. Bernacchi

SUBSCRIBED AND SWORN TO BEFORE ME this 5<sup>th</sup> day of May, 1997.

  
Notary Public

My Commission Expires:

Sept. 23, 2000



## **RICHARD L. BERNACCHI**

### **PROFESSIONAL EXPERIENCE**

**RICHARD L. BERNACCHI** is a senior partner in Century City-based Irell & Manella LLP, one of the leading commercial law firms in California. For more than 25 years Mr. Bernacchi has specialized in the legal, technical and strategic planning issues and opportunities and dispute resolutions arising from computer hardware and software, multimedia, telecommunications and other advanced technologies, including development, acquisition, protection and exploitation of intellectual property; licensing, distribution, manufacturing, joint venture and other strategic partnering arrangements; strategic planning and financing; acquisitions and mergers; contracts for the acquisition of information systems and other advanced technology products and services and related contract disputes.

He is the Co-Chairman of Committee R (International Computer and Technology Law) of the International Bar Association's Section on Business Law; member of the Advisory Board, former Director and Past President of the Computer Law Association; co-author of *Data Processing Contracts and the Law* (Little, Brown & Co., 1974); co-author of *Bernacchi on Computer Law* (Little, Brown & Co., 1986), and a frequent lecturer.

### **EDUCATIONAL BACKGROUND**

#### **1. Law School - University of Southern California (1961-64)**

**Awards:** Law Alumni Award (highest academic average in graduating class); Order of the Coif; Phi Delta Phi International Fraternity Graduate of the Year.

**Offices Held:** Editor-in-Chief, *Southern California Law Review*.

#### **2. College - University of Santa Clara**

**Degree:** B.S.C. (June, 1961)  
(Major: Accounting, Minor: Philosophy)

**Awards:** Delta Sigma Phi Scholarship Key (Highest scholastic average in School of Business); Quartermaster Association Medal & Scholastic Key; Distinguished Military Graduate.

**Honor Fraternities:** Alpha Sigma Nu, Beta Gamma Sigma, Scabbard & Blade.



## COMPUTER/INTELLECTUAL PROPERTY LAW EXPERIENCE

### A. Books and Articles

1. Co-author, *Bernacchi on Computer Law: A Guide to The Legal and Management Aspects of Computer Technology* (Little, Brown & Co., 1986).
2. Co-author, *Data Processing Contracts and the Law* (Little, Brown and Co., 1974).
3. Author, Chapter on "Acquiring Software Companies" in *Software Procurement, Nordic Yearbook of Law and Informatics* (1992).
4. Co-author, Chapter on "Distribution of Computer Software in Non-U.S. Countries: Five Important Concerns", *The Law and Business of Computer Software* (D.C. Toedt, ed. 1989)
5. Co-Author, "A Structured Approach to Analyzing the Substantial Similarity of Computer Software in Copyright Infringement Cases", 20 *Ariz. State Law Journal* 625 (Fall 1988).
6. Co-Author, "Computer System Procurement", 30 *Emory Law Journal* 395 (Spring, 1981).
7. Co-Author, "The Leasing of Hardware" and "Taxation of Computer Hardware and Software", *Computers And The Law*, Third Edition, Section of Science and Technology. American Bar Association (R. Bigelow ed. 1981).
8. Co-author, "Philosophy, Data Processing and the Rules of Evidence", 48 *Los Angeles Bar Bulletin* 374 (August, 1973).

### B. Planning and Advisory Boards

1. Member, Board of Advisors, and Past President of the Computer Law Association.
2. Member, Planning Committee, Computer Law Institute, University of Southern California Law Center (1980- ).
3. Chairman, Awards Committee, World Computer Law Congress (1991-1993).
4. Member, Advisory Board, *Computer Negotiations Report*, published by Sunscope International, Inc., Orlando, Florida.

5. Vice Chairman, Committee R of the Section on Business Law of the International Bar Association.
6. Member, Planning Committee, International Conference on Computers and Law.
7. Member, Advisory Board, Arizona Law and Technology Institute, Arizona State University College of Law (1982-1986).

**C. Lectures and Seminars**

1. Lecturer, Course on Data Processing Contracts in the Advanced Professional Program, University of Southern California Law Center, (Spring, 1972; Fall, 1978; and Fall, 1981).
2. Lecturer, ALI-ABA Course of Study on Law and Computers in the Seventies (1972).
3. Lecturer, American Bar Association, Section of Litigation, National Institute, "The Litigator in a Technological Age" (1975).
4. Lecturer, Computer Law Association, West Coast Conference (1976).
5. Lecturer, Computer Law Association, Annual Meeting Conference (1977).
6. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, University of Denver (1978).
7. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, University of Houston (1978).
8. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, University of Tulsa College of Law (1978).
9. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, Pacific Lutheran University, Seattle, Washington (1978).
10. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, University of Toledo (1978).
11. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, Washington University, St. Louis, Missouri (1978).
12. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, University of Denver (1978).

13. Lecturer, American Bar Association, Young Lawyers Division, National Institute, "Computers in Litigation" (1979).
14. Lecturer, Computer Law Association, West Coast Conference (1979).
15. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, American University, Washington, D.C. (1979).
16. Lecturer, Course on Practical and Legal Aspects of Negotiating Data Processing Contracts, Wright State University, Dayton, Ohio (1979).
17. Seminar Leader, "Computer Contracting - A Practical Guide", International Computer Negotiations, Inc. (1979 - 1980).
18. Lecturer, Computer Law Association, Annual Meeting Conference (1980).
19. Lecturer, Practicing Law Institute, West Coast Conference on Computer Law, San Francisco (1981).
20. Lecturer, COMDEX, "Beating the Tax Man Legally" and "Legal Problems of ISO's", 1981 Conference and Exposition, Las Vegas (1981).
21. Lecturer, EDP Auditors Association, Washington (June, 1981) and Los Angeles (1981).
22. Lecturer, "Forming and Financing High Technology Ventures", Third Annual Computer Law Institute, University of Southern California Law Center (1982).
23. Lecturer, Practicing Law Institute, Computer Law, New York (1983).
24. Lecturer, Annual Conference, Arizona Law and Technology Institute (1983).
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27. Lecturer, Pacific Rim Symposium, International Bar Association (1985).
28. Lecturer, National Computer Conference, Las Vegas, Nevada (1986).
29. Lecturer, "International Distribution of Computer Software", Seventh Annual Computer Law Institute, University of Southern California Law Center (1986).
30. Lecturer, "Selected Aspects of Negotiating Data Processing Contracts", California County Counsels' Association Conference (1987).

31. Lecturer, "Missed Opportunities and Pitfalls to be Avoided in Structuring End-User and Distribution Contracts", Eighth Annual Computer Law Institute, University of Southern California Law Center (1987).
32. Lecturer, "Potential Points of Conflicts in Advanced Technology Contracts", High Tech and Dispute Resolution Seminar, International Bar Association (1987).
33. Lecturer, "Source Code Escrows and Bankruptcy", London Computer Law Society (1987).
34. Lecturer, "Use of Expert Witnesses in Litigation Involving Computer Contracts", International Conference on Computers and Law (1988).
35. Lecturer, "Keys to Success in Professional Services Projects", 68th ADAPSO Management Conference (1988).
36. Lecturer, "The Impact that Computer Law Will Have on New and Emerging High Technology Applications", Ninth Annual Computer Law Institute, University of Southern California Law Center (1988).
37. Lecturer, "Selected Liability Issues Arising from Electronic Funds Transfers", 3rd National Conference on Computer Law, Buenos Aires, Argentina (1988).
38. Panelist, "Avoiding the Pitfalls in Negotiating Computer System Contracts", 23rd Annual Bank Council Seminar, California Bankers Association, San Diego, California (1990).
39. Moderator, "The Growing Importance of Patent Laws on the Computer Industry", University of Southern California Law Center 11th Annual Computer Law Institute, Los Angeles, California (1990).
40. Lecturer, "Software's Hottest Topics", "Advanced Strategies: Patents and Copyrights", and "Outsourcing Contracts", International Computer Negotiations, Inc.'s Master's Program, Los Angeles, California (1991).
41. Moderator and Lecturer, "Manufacturing and Marketing Opportunities In the United States and Canada", World Computer Law Congress, Los Angeles California (1991).
42. Lecturer, "Dispute Resolution", Committee R (International Computer and Technology Law Section), International Bar Association Section on Business Law 10th Biennial Conference, Hong Kong (1991).
43. Lecturer, "Computer Databases: Copyright and Other Protection From the U.S. Perspective", International Conference on Intellectual Property Rights, China National Federation of Industries, Taipei, Taiwan (1991).

44. Lecturer, "U.S.: Development and Marketing of Computer Software - Recent Developments", Fifth International Congress on Computer Law, São Paulo, Brazil (1991).
45. Lecturer, "After The License - Software Maintenance Agreements", Fifteenth Annual Institute, American Intellectual Property Law Association, La Quinta, California (1992).
46. Lecturer, Transactional Session, "Simulated Transactional and Litigation Sessions Covering State of the Art Issues in Computer Law", Computer Law Association, San Francisco, California (1992).
47. Commentator, "Acquiring Software Companies", Software Procurement '92, International Federation of Computer Law Associations, Stockholm, Sweden (1992).
48. Lecturer, "Selling Up, Selling Out", CORUM Conference Series, Los Angeles, California (1992).
49. Lecturer, "Negotiating the Best Deal", Software Asset Management Special Interest Group (SWAMI), Gartner Group, San Jose, California (1992).
50. Moderator, "The Impact of Technology and Law on Strategic Planning for Businesses in the Next Decade", Committee R (International Computer and Technology Law Section), International Bar Association Section on Business Law, Annual Conference, Cannes, France (1992).
51. Moderator and Lecturer, "Intellectual Property Laws: Getting the Competitive Edge", World Computer Law Congress, Second Biennial Conference, San Diego, California (1993).
52. Lecturer, "GOTCHA: Problems, Pitfalls and Strategies for Software Licensing", Software Asset Management Special Interest Group (SWAMI), Gartner Group, Atlanta, Georgia (1993).
53. Lecturer, "Selling Up, Selling Out", CORUM Conference Series, Los Angeles, California (1993).
54. Lecturer, "Extraction and Transplanting of Intellectual Property in a Failed International Venture: A Surgical Response", Fifth Annual International Law Weekend, State Bar of California, San Francisco, California (1993).
55. Moderator, "Leveraging the Emerging Software Pricing Models", Software Asset Management Special Interest Group (SWAMI), Gartner Group, San Francisco, California, New York, New York (1994).

56. Lecturer, "Finance, Distribution and Marketing Aspects of Interactive Media", Division 46 - Media Psychology, American Psychological Association Annual Convention, Los Angeles, California (1994).
57. Lecturer, "Outsourcing, A Growth Industry", National Intellectual Property Law Institute, Washington, D.C. (1994).
58. Lecturer, "Due Diligence in Business Transactions", Irell & Manella Due Diligence Seminar, Beverly Hilton Hotel, Beverly Hills, California (1994).
59. Panelist, Computer Law Association, Information Technology Law '95, Trends & Tips: How the Legal Profession Can Add Value; Contracting Workshop Part I: Tips and Resources, (1995).
60. Moderator, Computer Law Association, '96 Computer & Telecommunication Law Update and World Computer Law Congress; Developments in Anti-Trust and Trade Regulation, Annual Meeting Conference, (1996).
61. Lecturer, "Successful Software Development in New Environments", 17th Annual Computer Law Institute, University of So. California Law Center, (1996).
62. Lecturer, "How to Succeed at Content Acquisition, with a Focus on Online Use", 13th Annual Pacific Rim Computer Law Institute, Washington State Convention & Trade Center, (1996).
63. Panelist, "Protecting your IP Assets in Cyberspace", VentureNet'96, (1996).
64. Lecturer, "The Internet and Electronic Commerce in the United States", The 1997 CLA Pacific Rim Conference, Honolulu, Hawaii (February, 1997).
65. Panelist, "Markets of Tomorrow: Electronic Banking and Commerce", Computer Law Association, 1997 Computer & Telecommunications Law Update, Washington, D.C., ANA Hotel (April 24-25, 1997).

**CERTIFICATE OF SERVICE**

I, Daniel Meron, hereby certify that, on this May 6th, 1997, I served the foregoing Reply Comments of AT&T Corp. by mailing two copies, first-class postage prepaid, to each of the persons on the attached list.

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Before the  
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Washington, D.C. 20554

In the Matter of )  
 )  
Implementation of Infrastructure ) CC Docket No. 96-237  
Sharing Provisions in the )  
Telecommunications Act of 1996 )  
 )

**REPORT AND ORDER**

Adopted: February 6, 1997

Released: February 7, 1997

By the Commission:

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application of the antitrust laws.<sup>124</sup> We further note that there is ample authority granted to the Commission pursuant to Title II to set aside any carrier agreements that are found to violate the public interest.<sup>125</sup>

60. We also reject MCI's suggestions as unsupported by the statutory language and legislative history of section 259 and otherwise unnecessary to secure the benefits of section 259 for qualifying carriers. As noted, MCI asserts that section 259 pricing requirements must be established by the Commission in relation to those section 251-derived pricing guidelines set out in the *Local Competition First Report and Order* or qualifying carriers (and others) will not receive the benefits that Congress intended. We find, however, nothing in either the express statutory language of section 259 or its legislative history that persuades us that Congress intended any particular price outcome at all pursuant to the negotiation-driven regime contemplated by section 259. Rather, we think that the statutory language evidences a belief that the parties to section 259 negotiations are best able to determine what suits their requirements, subject to certain explicitly stated statutory limitations. We discuss the necessity for pricing rules or guidelines more fully at Section III. C. 4., *infra*.

## 2. Intellectual Property and Information Issues

### a. Background

61. We asked a variety of other questions about the meaning and scope of the language of section 259(a).<sup>126</sup> We noted that each element of public switched network infrastructure, technology, information, and telecommunications facilities and functions made available pursuant to section 259 might pose unique questions and issues for this proceeding. For example, we asked whether technology sharing would require mandatory patent licensing to qualifying carriers so that these carriers can develop equipment or software that is fully interoperative with proprietary systems (if any) deployed by an incumbent LEC. In cases where licensed technology is the only means to gain access to facilities or functions subject to sharing

<sup>124</sup> See S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess., at 34 (1996). See also L. Sullivan, *Antitrust* 125-126 ("The notion that one possessing a scarce resource must exploit it in ways which entail no arbitrary or invidious distinctions among customers is an ancient one . . . . A firm which holds a lawful monopoly . . . [may] be guilty of monopolization if it exploits that resource in ways which exclude or disadvantage customers arbitrarily or invidiously." (citing, e.g., *United States v. Terminal R.R. Association*, 224 U.S. 383, 32 S.Ct. 507 (1912); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945). And see *United States v. Associated Press*, 326 U.S. 1, 65 S.Ct. at 1422 ("The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common pool which is bound to reduce their competitors opportunity to buy and sell . . . ."); *Aspen Skiing v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985) ("The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified . . . . We squarely held that this right was not unqualified." (citing *Lorain Journal v. United States*, 342 U.S. 143 (1951))).

<sup>125</sup> See, e.g., 47 U.S.C. § 211.

<sup>126</sup> NPRM at ¶ 15-16.

requirements, we tentatively concluded that section 259 requires mandatory licensing, subject to the payment of reasonable royalties, of any software or equipment necessary to gain access to the shared capability or resource by the qualifying carrier's equipment.<sup>137</sup>

62. We also sought comment on what types of information must be made available to qualifying carriers by incumbent LECs pursuant to section 259(a). We asked whether marketing or other proprietary business information should be found to be included. We asked whether the information sharing mandated by section 259(a) implies any sort of joint network planning requirement.<sup>138</sup> Specifically, we asked whether section 259(a) requires incumbent LECs to make network information databases (other than those already required to be made available pursuant to section 251(c)(3)<sup>139</sup>) available to qualifying carriers and, if so, how? We sought comment on whether and how network information made available pursuant to section 259(a) might vary from that type of information to be disclosed under section 251(c)(5), which requires reasonable public notice of changes in the information necessary for transmission and routing of services using the incumbent LECs' facilities or networks.<sup>140</sup>

#### b. Comments

63. The majority of the commenters, i.e., larger LECs and Octel, which address the protection of proprietary information and other intellectual property rights, raise concerns about the Commission's tentative conclusions in the NPRM.<sup>141</sup> Several parties reject the Commission's tentative conclusion to require mandatory licensing in certain situations.<sup>142</sup> A number of the larger LECs and USTA comment that patent licensing is not needed for infrastructure sharing.<sup>143</sup> Other parties, such as Southwestern Bell, argue that, because incumbent LECs' networks are built upon licenses to use intellectual property, "the sharing of any intellectual property must be conditioned upon the qualifying carrier obtaining a sufficient license from parties that have a

<sup>137</sup> NPRM at ¶ 15.

<sup>138</sup> NPRM at ¶ 16.

<sup>139</sup> *Local Competition First Report and Order* at ¶¶ 452-503.

<sup>140</sup> 47 U.S.C. § 251(c)(5).

<sup>141</sup> See, e.g., Octel Comments at 3; NYNEX Comments at 13; Southwestern Bell Reply Comments at 11-12; Octel Reply Comments at 1-4.

<sup>142</sup> See, e.g., GTE Comments at 6 ("In some cases, [GTE] would not be permitted to license such technology."); Sprint Comments at 5; Southwestern Bell Reply Comments at 11-12.

<sup>143</sup> See NYNEX Comments at 12-13; Southwestern Bell Comments at 5-9; GTE Reply Comments at 5; USTA Comments at 5. See also Sprint Reply Comments at 5 ("infrastructure sharing can be accomplished through service agreements").

[protectable] interest in such property."<sup>144</sup> Southwestern Bell argues that there is no authority in section 259 for the Commission to "override any party's intellectual property rights, or the binding legal obligations of incumbent LEC[s]."<sup>145</sup>

64. Octel, a supplier of voice processing systems to government and businesses, including the larger LECs, argues that the property rights of third party providers that have licensing agreements with providing incumbent LECs should not be injured by the section 259-imposed sharing obligations placed on incumbent LECs.<sup>146</sup> Octel notes that the Commission's tentative conclusion about mandatory licensing is limited to those situations where licensed technology is "the *only means* to gain access to facilities or functions subject to sharing requirements."<sup>147</sup> Beyond those limited situations where mandatory licensing may be required, Octel argues that the Commission should not displace the commercial licensing process.<sup>148</sup> Octel maintains that, to the limited extent that the Commission might approve mandatory licensing, it should be subject to the proprietary information restrictions in third party providers' licensing schemes.<sup>149</sup>

65. A few parties, particularly RTC and AT&T, argue that proprietary information should be made available to qualifying carriers unconditionally.<sup>150</sup> RTC supports the Commission's tentative conclusion to require mandatory licensing, subject to reasonable royalties, where necessary to gain access to a shared capability or resource by the qualifying carrier's equipment.<sup>151</sup> AT&T contends that "[incumbent LECs] that have obtained the right to use software generics from their switching vendors are entitled to use those facilities to serve not only their own traffic, but also to serve qualifying carriers that share the incumbent carriers' infrastructure under Section 259 without any additional costs or fees."<sup>152</sup> In fact, according to

<sup>144</sup> Southwestern Bell Comments at 5. Cf. NYNEX Comments at 13; Sprint Comments at 5.

<sup>145</sup> Southwestern Bell Comments at 7; see also Southwestern Bell Reply Comments at 11-12.

<sup>146</sup> Octel Comments at 1-4; Octel Reply Comments at 1-4. Octel explains that its licensing agreements allow LECs access to a wide variety of proprietary information that is subject to strict nondisclosure arrangements. Octel Comments at 2.

<sup>147</sup> Octel Comments at 3.

<sup>148</sup> Octel Comments at 3 n.5 ("Given the availability of voice processing technologies . . . a qualifying carrier ought to purchase such service from Octel or another vendor independently of its sharing agreement with an incumbent LEC . . .").

<sup>149</sup> Octel Comments at 3.

<sup>150</sup> RTC Comments at 6; AT&T Comments at 2 n.2; AT&T Reply Comments at 5.

<sup>151</sup> RTC Comments at 6.

<sup>152</sup> AT&T Comments at 2 n.2.

AT&T, "[i]f qualifying carriers were required to negotiate licensing agreements with all of an [incumbent LEC's] equipment vendors, none of which have any incentive to negotiate reasonable terms or to act expeditiously with a small, rural carrier, it is reasonable to assume that the carrier's ability actually to use the [incumbent LEC's] infrastructure to serve its customers will be seriously impeded."<sup>153</sup> RTC comments that, in some cases, joint network planning will be required to implement sharing obligations.<sup>154</sup>

66. Some commenters specify that marketing information should not be included within the scope of section 259(a).<sup>155</sup> For example, PacTel and GTE contend that marketing information would not facilitate infrastructure sharing because it only relates to the providing incumbent LEC's customer base.<sup>156</sup> USTA would except intellectual property and marketing information, but asserts that "[o]ther public information owned by the providing LEC . . . necessary for a [qualifying carrier] to provide services to its customers using the shared infrastructure, technology or telecommunications facilities, would plainly fall under the scope of Section 259."<sup>157</sup> Without further specification, RTC argues that there may be databases that are necessary for a qualifying carrier to fully benefit from the sharing arrangement beyond that which an incumbent LEC is required by section 251(c)(3) to provide competitors.<sup>158</sup> PacTel argues that, where proprietary information is necessary for the qualifying carrier to provide telecommunications services to its customers, it should be provided pursuant to nondisclosure agreements.<sup>159</sup>

#### c. Discussion

67. As described above,<sup>160</sup> the negotiation-oriented framework we have decided to adopt in defining the scope of section 259(a) obviates the need to define specifically what is included in the "public switched network infrastructure, technology, information, and telecommunications facilities and functions" that incumbent LECs must make available to

<sup>153</sup> AT&T Reply Comments at 5 (footnote omitted). As an example, AT&T cites to a dispute between itself and Southwestern Bell over licenses and right-to-use agreements in an interconnection proceeding before the Public Utility Commission of Texas. AT&T Reply Comments at 5-6 n.12. See also RTC Comments at 6 ("A providing carrier cannot be permitted to refuse to license a patent as grounds for avoiding its obligations under Section 259.")

<sup>154</sup> RTC Comments at 7. But cf. GTE Reply Comments at 12; PacTel Comments at 9.

<sup>155</sup> See, e.g. GTE Reply Comments at 5-6; Southwestern Bell Comments at 9-10; Sprint Comments at 4.

<sup>156</sup> GTE Reply Comments at 6. See also PacTel Comments at 8-9.

<sup>157</sup> USTA Comments at 6.

<sup>158</sup> RTC Comments at 7.

<sup>159</sup> PacTel Comments at 8-9. See also Octel Comments at 3-4.

<sup>160</sup> See Discussion at Section III. B. 1., *supra*.

qualifying carriers. We are persuaded that an approach that attempts to identify discrete elements -- or even examples -- of public switched network infrastructure, technology, information, and telecommunications facilities and functions would tend to defeat the legislative purpose which is to better ensure that qualifying carriers have access to evolving technology. As we noted above, we conclude that the language in section 259(a) that requires section 259 arrangements be made available "for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services" acts as a limitation on the scope of information available under section 259.<sup>161</sup> It is reasonable to assume that certain types of information could be found to be remotely connected, at best, to advancing this stated purpose of section 259.<sup>162</sup> We have decided, nevertheless, not to exclude, *per se*, any type of information or information service from the negotiation process.

68. The very flexibility of our approach to defining the scope of section 259(a), however, would seem to exacerbate those disagreements between commenters about intellectual property issues, specifically, where otherwise protectable intellectual property is owned or controlled by incumbent LECs and is properly sought by qualifying carriers. There is, for example and as we have noted, sharp disagreement between larger LECs and Octel, on the one hand, and smaller LECs and other parties, on the other hand, about the scope of necessary protection for such proprietary information. The larger LECs and Octel appear to suggest that the possession of proprietary information, including information licensed from third parties like Octel, necessitates a Commission decision that imposes restrictions on the sharing of such information. According to these commenters, unless such information is provided to qualifying LECs pursuant to separately negotiated agreements or to restrictive non-disclosure clauses in section 259 agreements, the result will force incumbent LECs to breach their contracts with third parties.<sup>163</sup> Smaller LEC commenters and their representatives, on the other hand, essentially argue that the restrictions proposed by the larger LECs would defeat the effectiveness of section 259 and, in effect, allow incumbent LECs to avoid their section 259 obligations altogether in many cases.<sup>164</sup>

69. We affirm our tentative conclusion that, whenever it is "the *only means* to gain access to facilities or functions subject to sharing requirements,"<sup>165</sup> section 259 requires the providing LEC to seek, to obtain, and to provide necessary licensing, subject to reimbursement for or the payment of reasonable royalties, of any software or equipment necessary to gain access to the shared capability or resource by the qualifying carrier's equipment. In the ordinary course

<sup>161</sup> See 47 U.S.C. § 259(a).

<sup>162</sup> See 47 U.S.C. § 259(a). See also RTC Comments at 6-7.

<sup>163</sup> See, e.g., Southwestern Bell Comments at 5-9. See also Sprint Comments at 5.

<sup>164</sup> See, e.g., RTC Comments at 6. See also AT&T Reply Comments at 3-6.

<sup>165</sup> NPRM at ¶ 15 (emphasis added). See also Octel Comments at 3.

of providing "public switched network infrastructure, technology, information, and telecommunications facilities and functions" to qualifying carriers, we fully anticipate that such licensing will not be necessary.<sup>166</sup> We believe that, as suggested by AT&T and Sprint, infrastructure sharing can be accomplished through the use of agreements whereby providing incumbent LECs who own or lease certain types of information or other intellectual property provide functionalities and services to qualifying carriers without the need to transfer information that is legitimately protectable.<sup>167</sup>

70. We expect that the same process will occur in the context of negotiating section 259 agreements. At any rate, we agree with AT&T and RTC that providing incumbent LECs may not evade their section 259 obligations merely because their arrangements with third party providers of information and other types of intellectual property do not contemplate -- or allow -- provision of certain types of information to qualifying carriers. Therefore, we decide that the providing incumbent LEC must determine an appropriate way to negotiate and implement section 259 agreements with qualifying carriers, *i.e.*, without imposing inappropriate burdens on qualifying carriers. In cases where the only means available is including the qualifying carrier in a licensing arrangement, the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly. We emphasize that our decision is not directed at third party providers of information but at providing incumbent LECs. We merely require the providing incumbent LEC to do what is necessary to ensure that the qualifying carrier effectively receives the benefits to which it is entitled under section 259.

71. Regarding RTC's comments on the provision of network information databases (other than those already required to be made available pursuant to section 251(c)(3)) to qualifying carriers, we conclude that there is no independent network information disclosure requirement set out in section 259(a). Similarly, we determine that Section 259(a) infrastructure sharing requirements are independent of current disclosure requirements, or any that the Commission may hereafter adopt, pursuant to Section 251.<sup>168</sup> Network information disclosure to qualifying carriers is properly the subject of section 259(e). As a result, we discuss commenters' positions on information disclosure and decide these issues in Section III. D., *infra*.

### 3. Dispute Resolution, Jurisdiction, and Other Issues

#### a. Background

<sup>166</sup> See, e.g., GTE Reply Comments at 5; USTA Comments at 5-6.

<sup>167</sup> AT&T Reply Comments at 4-5 ("the qualifying carrier will purchase the use of the [incumbent LEC's] facilities and services -- in the same manner that carriers have historically done -- without acquiring access to embedded intellectual property"); Sprint Comments at 5; Sprint Reply Comments at 4-5.

<sup>168</sup> See, e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order, CC Docket No. 96-98, FCC 96-333, 11 FCC Red 15499 (rel. August 8, 1996) (*Local Competition Second Report and Order*). See also Discussion at Section III. B. 1., *infra*.



Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of SBC Communications	)	
Inc. et al. Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to	)	CC Docket No. 97-121
Provide In-Region, InterLATA	)	
Services in the State of Oklahoma	)	
	)	

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EVALUATION OF THE  
UNITED STATES DEPARTMENT OF JUSTICE

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May 16, 1997

There are also serious concerns about SBC's limitations on the availability of unbundled elements in its SGAT, which requires parties interested in taking unbundled elements to provide indemnification for any infringement of intellectual property rights that may result from combining or using services or equipment provided by SWBT. SGAT, § XV, ¶ A. 7, at 19. In order to assure SWBT that it has no liability for intellectual property claims, users of unbundled elements will have to obtain licenses from approximately 40 equipment vendors, resulting in delay and additional expense. *Id.* ¶ A. 6, at 18. SWBT has told AT&T that it will not provide any unbundled element for which it believes a license is required, until AT&T obtains such a license or a certification that a license is not required from the third party owner. Affidavit of Thomas C. Pelto ("Pelto Aff.") ¶ 3, attached to AT&T FCC Comments. Additionally, if SBC's competitor is sued by a third party over the use of this intellectual property, the SGAT provides that "SWBT shall undertake and control the defense and settlement of any such claim or suit and LSP [Local Service Provider] shall cooperate fully with SWBT in connection herewith." SGAT, ¶ A. 7.

It is far from clear that there are legitimate third party intellectual property rights that

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proceeding, and it offered no witnesses for cross-examination in the state Section 271 proceeding in Oklahoma. With this application, SBC has presented only a summary affidavit by J. Michael Moore, purporting to describe in general terms some parameters and assumptions of SBC's cost studies, but not actually disclosing the underlying studies themselves, and simply asserting the conclusion that "the costs provided by SWBT meet the requirements of the Act" and the Commission's regulation and "provide a suitable basis for rates." See Affidavit of J. Michael Moore, attached to SBC Brief. AT&T has an alternative cost study which concludes that SBC's prices significantly exceed costs.

would be affected by the sale of an unbundled network element functionality.<sup>63</sup> But whether there are such rights or not, SBC's use of the claim of such rights to place burdens on parties seeking access to unbundled elements has unreasonable consequences, potentially delaying and increasing the expense of entry. The Commission has already articulated procedures, in its Order implementing the infrastructure sharing obligations imposed by Section 259 of the Act,<sup>64</sup> by which an ILEC, CLEC, and third party vendor could work together, in the case of legitimate third-party claims of intellectual property rights, to assure that the vendor's rights are protected and that the CLEC gets the non-discriminatory access required under the Act. The Commission has stated, "[i]n the ordinary course . . . we fully anticipate that such licensing will not be necessary," Infrastructure Sharing Order ¶69, but that in any event, the providing incumbent LEC

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<sup>63</sup>Pelto Aff. ¶¶ 30-34. AT&T presents arguments which support the view that, because most intellectual property rights are extinguished with the first sale of the product containing the intellectual property, and given that, in providing the unbundled elements the ILEC never relinquishes control of the element, it is unlikely that any real violations of a third party's intellectual property rights are at issue. AT&T and MCI have both challenged the legality of SBC's position requiring interconnectors to secure intellectual property licences from third party vendors under the Act. AT&T has challenged this requirement in federal district court in Texas. AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Co. and the Commissioners of the Public Utility Commission of Texas, Civ. Action No. A 97CA 029 (W.D. Tex. filed Jan. 10, 1997). MCI has filed a Petition for a Declaratory Ruling at the Commission. In the Matter of Petition of MCI for Declaratory Ruling, CCBPol 97-4, (filed Mar. 11, 1997). Various vendors have raised doubts about the applicability of third-party licensing rights to unbundled elements in most situations where the CLEC is not using the unbundled elements in a different manner than the ILEC. See, e.g., Comments of Northern Telecom Inc., In the Matter of Petition of MCI for Declaratory Ruling, CC Docket No. 96-98, CCBPol 97-4, at 5-6 (filed Apr. 15, 1997); Comments of Lucent Technologies Inc., CCB Pol 97-4, at 2 (Apr. 15, 1997).

<sup>64</sup> Report and Order, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, ("Infrastructure Sharing Order"), CC Docket 96-237 (rel. Feb. 7, 1997).

must not impose "inappropriate burdens on qualifying carriers," and if a license is required, "the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly." *Id.* ¶ 70. SBC's handling of this issue, in contrast, puts the burdens and the risk on the CLEC seeking to use its unbundled elements. *Pelto Aff.*, ¶¶ 8-12.

At this time, given the lack of competition in Oklahoma and the various obstacles SBC has placed in the path of competitive entry, SBC's in-region interLATA entry in Oklahoma would not be consistent with the public interest.

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

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BY [Signature] DEPUTY

SOUTHWESTERN BELL  
TELEPHONE CO. *et al.*  
Plaintiff,

v.

AT&T COMMUNICATIONS  
OF THE SOUTHWEST, INC. *et al.*  
Defendant  
and consolidated cases

C.A. No. A-97CA-132-SS<sup>1</sup>

MOTION OF THE FEDERAL COMMUNICATIONS  
COMMISSION FOR LEAVE TO APPEAR  
AND PARTICIPATE AS AMICUS CURIAE

The Federal Communications Commission ("FCC"), by and through its undersigned attorneys, hereby moves the Court for leave to appear and participate in AT&T Communications of the Southwest v. Southwestern Bell Telephone Co., C.A. No. A-97CA-029-SS, one of the actions consolidated herein, as amicus curiae, for purposes of supporting referral of certain issues raised in the litigation to the FCC under the doctrine of "primary jurisdiction."

AT&T Communications of the Southwest brought an action against Southwestern Bell Telephone Co. and the Commissioners of the Texas Public Utility Commission ("the Texas PUC"), alleging that an agreement arbitrated by defendant Commissioners between AT&T and Southwestern Bell Telephone violates Section 251 and 252 of the Telecommunications Act of 1996 ("the 1996 Act"). In cross-motions to the Court, both AT&T and Southwestern Bell have suggested that certain issues raised by the lawsuit are appropriate for referral to the Federal Communications Commission ("FCC") on primary jurisdiction grounds. The FCC moves this

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<sup>1</sup> In an order dated March 21, 1997, the Court consolidated Cause Nos. A-97-CA-029-SS, A-97-CA-044-SS, and A-97-CA-126-SS with Cause No. A-97-CA-132-SS. This brief addresses issues raised in Cause No. A-97-CA-029-SS.

Court for leave to appear and participate as amicus curiae in order to explain why primary jurisdiction referral is appropriate in this case.

### ARGUMENT

"The privilege of being heard amicus rests in the discretion of the court, which may grant or refuse leave according as it deems the proffered information timely, useful, or otherwise."

Leigh v. Engle, 535 F. Supp. 418 (N.D. Ill. 1982) (citing 3A C.J.S. Amicus Curiae § 3). In exercising this discretion, courts have been guided by considerations of whether the parties to the suit will adequately address the issues raised by the litigation, Village of Elm Grove v. Py, 724 F. Supp. 612, 613 (E.D. Wis. 1989), and whether the participation of amicus would help illuminate the issues raised by the parties. Skandia America Reinsurance Corp. v. Schenck, 441 F. Supp. 715, 718 (S.D.N.Y. 1977); Wilson v. Al McCord, Inc., 611 F. Supp. 621, 622 (W.D. Okla. 1985), aff'd in part and rev'd in part on other grounds, 858 F.2d 1469 (10th Cir. 1988).

The FCC submits that its timely motion to participate as amicus should be granted because it has an immediate interest in the primary jurisdiction issue raised in this litigation, which may not be adequately addressed by the parties. Participation by the FCC will serve to illuminate the bases for the primary jurisdiction doctrine, as well as the propriety of its exercise in the instant case. The FCC further has a strong interest in the initial interpretation of regulations newly promulgated pursuant to the 1996 Act.

This motion is not untimely. Argument on the cross-motions of the parties has not yet been set. Participation by the FCC will not result in delay or prejudice to the existing parties, both of whom have also urged a primary jurisdiction referral to the FCC.

CONCLUSION

For the foregoing reasons, the FCC respectfully moves the Court for leave to appear and participate as amicus curiae.

Respectfully submitted,

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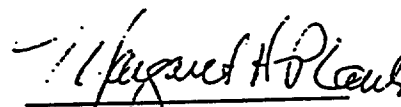
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## CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Motion of the Federal Communications Commission for Leave to Appear and Participate as *Amicus Curiae*, Brief of Federal Communications Commission as *Amicus Curiae* in Support of Primary Jurisdiction Referral, and proposed Order were served, by first class mail, postage prepaid, upon:

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FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

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BY *[Signature]* DEPUTY

SOUTHWESTERN BELL  
TELEPHONE CO. *et al.*  
Plaintiff,

v.

AT&T COMMUNICATIONS  
OF THE SOUTHWEST, INC. *et al.*  
Defendant  
and consolidated cases

C.A. No. A-97CA-132-SS

**BRIEF OF FEDERAL COMMUNICATIONS COMMISSION  
AS AMICUS CURIAE IN SUPPORT OF PRIMARY JURISDICTION REFERRAL**

The Federal Communications Commission ("FCC") submits this brief as *amicus curiae* in AT&T Communications of the Southwest v. Southwestern Bell Telephone Co., C.A. No. A 97-CA029-SS, in support of referral of certain issues to the FCC under the doctrine of "primary jurisdiction." In cross motions, defendant Southwestern Bell Corp. ("SWB") and plaintiff AT&T Communications Corp. ("AT&T") both have suggested that aspects of this case are appropriate for primary jurisdiction referral because underlying the legal issues is a dispute over the proper interpretation of pertinent FCC regulations. See SWB Motion to Dismiss Pursuant to Rules 12(b)(6) and 12(b)(1) at 11; AT&T Consolidated Memorandum at 18-21. Specifically, this case turns on the resolution of two regulatory disputes:

- (1) whether SWB's regulatory obligation to provide AT&T with "nondiscriminatory" access to SWB's unbundled network elements requires AT&T, rather than SWB, to obtain any necessary licenses or right-to-use agreements from SWB's third-party vendors ("*the Intellectual Property Dispute*"); and
- (2) whether AT&T may request that SWB provide AT&T's customers with certain types of "transitional number portability mechanisms" beyond those specified in the FCC's rules ("*the Number Portability Dispute*").

The FCC agrees that these issues are appropriate for primary jurisdiction referral. Upon such a referral, the FCC will act promptly to rule on the parties' competing interpretations of the FCC's regulations and will report the results of its administrative proceedings to the Court.

### **BACKGROUND**

*The Telecommunications Act of 1996.* The Telecommunications Act of 1996 ("the 1996 Act") mandates the opening of local telephone markets to competition. See 47 U.S.C. §§ 251-260. To assure rapid competitive entry, Congress imposed certain interconnection obligations on existing local exchange carriers, such as SWB.

Two sections of the 1996 Act are most relevant for purposes of this case. Section 251(b)(2) requires that local exchange carriers ("LECs") "provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the [FCC]."<sup>1</sup> Section 251(c)(3) obligates incumbent local exchange carriers to provide "nondiscriminatory access to network elements on an unbundled basis . . . on terms and conditions that are just and reasonable and nondiscriminatory . . . ." Section 251(d) of the Act required that the FCC issue regulations implementing these and other provisions of Section 251 within six months of enactment, a deadline that the Commission satisfied.

The Act further requires incumbent LECs and new entrants to negotiate agreements on the terms of interconnection with the existing network (§ 251(c)(1)); requires that such agreements be submitted to the appropriate state PUC for approval (§ 252(e)(1)); and requires

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<sup>1</sup> "Number portability" allows customers of an incumbent LEC, such as SWB, to retain their local telephone numbers if they choose to switch to a different provider of local telephone service.

rapid arbitration by the state PUC (or alternatively by the FCC) of any disputes between the negotiating parties (§ 252(b)). The Act specifies that arbitrated agreements must conform to the provisions of Section 251 and the regulations of the FCC (§ 252(c)(1)), and provides for review of state PUC decisions approving agreements in the federal district courts (§ 252(e)(6)) to assure such compliance.

*The FCC's Implementing Regulations.* The FCC promulgated rules implementing the number portability requirement on July 2, 1996. *In re Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996). The FCC required that all local telephone carriers provide "transitional measures [for number portability], which may consist of Remote Call Forwarding (RCF), Flexible Direct Inward Dialing (DID), or any other comparable and technically feasible method . . . ." 47 C.F.R. § 52.27 (a).<sup>2</sup>

On August 8, 1996, the FCC issued its rules implementing, *inter alia*, the incumbent local exchange carriers' obligation to provide access to unbundled network elements. *In re Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996), *review pending*, *Iowa Util. Bd. v. FCC*, No. 96-3321 (8th Cir.). The FCC required that an incumbent local exchange carrier provide a competitor with access to unbundled network elements on "just, reasonable, and non-discriminatory terms and conditions" that are no less favorable than the terms and conditions on which the incumbent LEC provides such elements to itself. 47 C.F.R. § 51.313. The FCC

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<sup>2</sup> The FCC recently issued a *First Reconsideration Order*, FCC 97-74 (rel. March 11, 1997), which does not address the "transitional" number portability rules.

further prohibited an incumbent from imposing any "limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner that the requesting carrier intends." 47 C.F.R. § 51.309.

Although some of the pricing regulations adopted by the FCC in implementing Section 251 have been stayed by the Court of Appeals for the Eight Circuit, the stayed pricing rules are *not* involved in the instant case. *See Iowa Util. Bd. v. FCC*, 1996-2 Trade Cases ¶ 71,598 (Oct. 15, 1996). The FCC's number portability rules, and the non-pricing rules governing access to unbundled elements, have not been stayed, are fully in force, and are binding on the state PUCs in implementing Section 251.

#### ARGUMENT

Before this Court can determine whether the interconnection agreement approved by the Texas PUC complies with the requirements of the 1996 Act and applicable FCC regulations, the conflict between the parties regarding the proper interpretation and application of the FCC's regulations must be resolved. The FCC demonstrates below that resolution of the two regulatory disputes raised by the parties is appropriate for primary jurisdiction referral to the FCC before the Court proceeds with review of the agreement under Section 252(e)(6) of the 1996 Act.

#### I. *THE DOCTRINE OF PRIMARY JURISDICTION*

The doctrine of primary jurisdiction "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an